

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 272 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and  
MR.JUSTICE M.C.PATEL

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. Whether Reporters of Local Papers may be allowed  
to see the judgements? Yes

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3. Whether Their Lordships wish to see the fair copy  
of the judgement?

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?  
2 to 5 No

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STATE OF GUJARAT

Versus

GOVINDBHAI JAKHUBHAI

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Appearance:

MR.P.G.DESAI, GOVERNMENT PLEADER, with

MR.M.A.BUKHARI,AGP, for Appellant.

MR R.N SHAH for Respondent No. 1

NOTICE SERVED on Respondent No. 2

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CORAM : MR.JUSTICE R.K.ABICHANDANI and

MR.JUSTICE M.C.PATEL

Date of decision: 22/12/98

ORAL JUDGEMENT(Per R.K.Abichandani,J.)

The Appellant-State of Gujarat challenges in this appeal the judgment and order dated 3.9.1982 passed by the learned Civil Judge (S.D.), Himatnagar, in Special Civil Suit No.33 of 1979, holding it to be vicariously liable for the tortious act of its police constable and decreeing compensation of Rs.1,98,000/- with 6 per cent interest from the date of the suit till payment and costs, in favour of the present respondent No.1, Govindbhai, who was the original plaintiff.

2. The plaintiff's case was that at the relevant time when he had undertaken the work as a contractor for construction of Rajendranagar Dam, the present respondent No.2, Keshabhai, who is the original defendant No.2, was working as a Police Constable at Raigadh Outpost and was in the service of the appellant-State of Gujarat, who was the original defendant No.1. On 22.4.1976, after the close of the work for the day, the plaintiff was proceeding to Himatnagar for purchasing a kingpin for his damaged truck and when he was passing by the Raigadh Police Outpost, which is on the highway, he came to know that the truck-driver, Devan Ruda, who was carrying some of his labourers in his truck, was detained in the Outpost and was being manhandled. The plaintiff, therefore, went inside the Police Outpost and requested the Constable, defendant No.2, to desist from beating the driver, asking him that he may take legal action as may be warranted, but should not take law into his own hands. Thereupon, the defendant No.2-Constable became excited and started abusing the plaintiff and gave him threats. He asked another policeman to bring his rifle from the adjoining room, and on getting the rifle, he continued his hostility towards the plaintiff and before the plaintiff could run away, he fired a shot at him, which hit the plaintiff on his right thigh above the knee-cap. The plaintiff fell down and had to be carried by his son Hirjibhai in the jeep-car to the hospital at Himatnagar where he was admitted as an indoor patient. According to the plaintiff, he was transferred to the Civil Hospital,

Ahmedabad for further treatment and thereafter was operated upon by an eminent Orthopaedic Surgeon. The bullet-injury, however, did not heal and the plaintiff had to get his right leg amputated above the knee-cap. The plaintiff thus lost his limb because of illegal and unauthorised firing by the defendant No.2. According to the plaintiff, the defendant No.2 had acted wrongfully, illegally and unauthorisedly in assaulting and injuring the plaintiff. It was contended that since the defendant No.2 was in the service of the defendant No.1 at the relevant time and since the defendant No.2 acted illegally and wrongfully and fired the shot from his rifle at the plaintiff with a view to cause injury, the act of the defendant No.2 was a tortious act for which the defendant No.1 was vicariously liable. According to the plaintiff, because of his confinement to the hospital for a period of more than six months and loss of his leg, he was not able to attend to his work as a contractor for 12 months. He was having a monthly income of Rs.3,500/at the relevant time, which was lost to him for a period of 12 months. Moreover, he had to employ two persons for getting the work done, which he would have done himself and had, therefore, to spend Rs.1500/- per month. He had lost his earning capacity by 50% as a result of this tortious act of defendant No.2 and his yearly economic loss would come to Rs.18,000/-, and that, at the multiplier of 7, he was entitled to claim Rs.1,26,000/by way of compensation. For loss of enjoyment of life and diminution in full pleasures of living, he claimed Rs.25,000/-. For the personal expenses, he claimed a further sum of Rs.25,000/-; for mental shock, he claimed Rs.25,000/-, and, for diminished capacity to work, a further sum of Rs.25,000/-. He also claimed Rs.25,000/for future expenses on medical treatment. The total claim was put up at Rs.2,26,000/-. Statutory notice under Section 80 of the Code of Civil Procedure, 1908 was sent by the plaintiff to the State, which was served on 15.2.1979. According to the plaintiff, both the defendants were liable for the tortious act of the defendant No.2 which resulted in grievous injury to the plaintiff.

3. In the written statement, Exh.25, the allegations regarding the incident were denied. It was alleged that on the contrary the plaintiff and others had tried to attack the Police Outpost and had obstructed the public servants in discharge of their duties. It was alleged that the plaintiff had received injuries due to his own wrong. It was denied that he was illegally, wrongfully or unauthorisedly assaulted and injured by the defendant No.2. It was alleged that the plaintiff had taken law in

his own hands and tried to overawe the public servants in discharge of their duties by criminal assault and intimidation. In the alternative, it was contended that the defendant No.2 Constable did not have any authority to fire from his rifle and that he had deliberately fired from his rifle with a view to cause injury to the plaintiff, for which the State of Gujarat is not liable. It was contended that for unauthorised and deliberate acts of its employees, the State of Gujarat was not liable and there was no vicarious responsibility on the part of the State of Gujarat for the alleged wrong done to the plaintiff. The plaintiff was put to strict proof regarding the amputation of his right leg and its being lost because of the unauthorised and illegal firing of the defendant No.2 and also to the strict proof of proving that he was not in a position to walk or that he had to walk on crutches. It was denied that the defendant No.2 committed any tortious act, during the course of the employment of the defendant No.1. It was also denied that the deprivation of leg had resulted in great financial loss to the plaintiff. Various other contentions raised in the plaint were specifically denied.

4. Issues were framed at Exh.23 and on the question of tortious liability of the defendant No.2 and the vicarious liability of the defendant No.1, though no separate issue was framed, both the sides had understood the pleadings, as it transpires from the record and the arguments made before the trial Court, and they seem to have argued on that aspect under issue No.1, which is an omnibus issue on the question of the tortious liability of both the defendants.

5. The trial Court, on the basis of the evidence on record, came to a finding that the defendant No.2 had illegally, wrongfully and unauthorisedly injured the plaintiff by firing a gun shot at him during the course of his employment with the State of Gujarat. The contention that the State of Gujarat was not vicariously liable for such tort committed by the defendant No.2 was negatived. After referring to the decision in *Storey v. Ashton* (1968-69) 4 QBD 476, the provisions of Art.300 of the Constitution, the decision of the Supreme Court in *Kasturi Lal Balia Ram Jain v. State of U.P.*, AIR 1965 SC 1039 and a decision of the Allahabad High Court in *Uttar Pradesh Government v. Ram Milan and others*, reported in AIR 1967 Allahabad 287, the trial Court came to a finding that the defendant No.2 Constable had committed the tortious act during the course of his employment with the defendant No.1-State of Gujarat and that the State of

Gujarat was vicariously liable for such tort committed by its employee. The trial Court rejected the defence that the State was not vicariously liable because the act was relatable to the sovereign powers of the State. Considering the claim made under various heads by the plaintiff, the trial Court awarded a total amount of Rs.1,98,000/- by way of damages to the plaintiff with interest and costs.

6. The learned Government Pleader, appearing for the appellant-State of Gujarat, contended before us that manning of a Police OutPost by the constabulary was an essential part of the exercise of the sovereign function of the State of maintaining law and order and therefore even if it is established that the Constable Keshabhai, respondent No.2, had, during the course of his employment at the Raigadh Out Post, committed the tortious act in purported discharge of his duties, the State of Gujarat cannot be held vicariously liable for such tort. The learned Counsel heavily relied on the decision of the Supreme Court in Kasturi Lal's case (supra) in which the Constitution Bench of the Supreme Court, while dealing with the case, where the property which was seized (gold) was not returned and a suit was filed to recover that property or in lieu thereof its value and damages, held that though the manner in which the gold seized from the plaintiff had been dealt with at the 'Malkhana' showed a gross negligence on the part of the police officers and that the loss suffered by the plaintiff was due to negligence of the police officers of the State and the act which gave rise to the claim for damages had been committed by the employee of the State during the course of its employment, the employment in question being of the category which had the special characteristic of sovereign power, the claim could not be sustained. It was held that there was a material distinction between the acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is : Was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not

by virtue of the delegation of any sovereign power, an action for damages would lie.

The learned Government Pleader argued that since maintenance of law and order was purely a sovereign function, a tort committed by a Constable will not raise any vicarious liability on the part of the State and the State can successfully plead the defence on that ground. It was submitted that if such liability of the State is to arise due to such tortious acts of the constables, it would become impossible for the State to carry on its functions of maintenance of law and order smoothly. He further argued that even if the tortious act resulted in breach of fundamental right guaranteed by Article 21 of the Constitution, there was no liability on the part of the State, when the alleged wrongful act is relatable to the exercise of the sovereign powers of the State. It was finally urged that the evidence did not satisfactorily establish that the fundamental right of the respondent No.1 was violated by the tortious act of the respondent No.2-Constable.

7. The learned Counsel appearing for the respondent No.1 contended that the State cannot plead act of State in India because the States do not possess external sovereignty, which vests in the Union of India. He submitted that the concept of "King can do no wrong" was wholly inapplicable in Indian context. He submitted that the facts clearly established that the respondent No.2 Police Constable was tried under Sec.307 I.P.C. for having attempted to murder the respondent No.1 and that he was convicted by the High Court for the offence under Section 326 of the Indian Penal Code and sentenced to six months' rigorous imprisonment and to pay a fine of Rs.500/-, by judgment and order dated 8.11.1980 in Criminal Appeal No.59 of 1978. Referring to the certified copy of that decision, which is at Exh.79, he pointed out the observation of the Court to the effect that the case illustrates how dangerous it is to give fire-arm to a policeman who is irresponsible and untrained and how the weapons meant for the protection of the citizens could be used as weapons of oppression. The Court had observed that if the act like the one committed by the respondent goes unpunished, people will lose faith in the judiciary and the judicial system. It was observed that the respondent had no business to lose his temper and misuse the firearm which was given to him, to protect the lives and properties of citizens. He also pointed out the observation that there was no justification for the action of the respondent No.2 which had resulted in irreparable loss to an unarmed person,

whose only fault was that he wanted to ventilate his grievance before the superior officer of the respondent-Constable.

It was contended that the medical-evidence clearly establishes the grievous injuries which were caused by the respondent No.2. According to him, the evidence establishes that the respondent No.1 had gone to the police station to ensure that the driver of the truck was not manhandled any further and that since he told the Constable that he would complain to his superior, the Constable got enraged and fired from his rifle at him. It was submitted that such an act on the part of the Police Constable amounted to tort and for such tort, not only the Constable was liable for damages, but even the State was vicariously liable. He submitted that when there was breach of fundamental right by a public servant, the State was liable to compensate the victim. He submitted that the decision in Kasturi Lal's case (supra) cannot be invoked by the State because in that case it was a tort of conversion and there was no violation of any fundamental right.

8.1 The respondent No.1, in his deposition Exh.65, has narrated the incident that took place on 22.4.1976. He has stated that one of his trucks had left with the labourers and he had thereafter started in his jeep-car along with his son Hirjibhai on that evening for buying a kingpin. When they came near Raigadh Outpost, he learnt that his truck-driver Devdan Duda was detained at the Outpost and beaten up. He, therefore, went inside the Outpost and requested the respondent No.2, Keshabhai, who was a Constable on duty, not to beat his driver. At that time, the respondent No.2, who was drunk, gave abuses to the respondent No.1 and told him to leave the Outpost. Since he did not leave, the respondent No.2 called for his rifle and took an aim at the respondent No.1 and fired a shot that resulted in an injury on his right thigh. He fell down and his son Hirjibhai came inside the Outpost and took him to the Civil Hospital at Himatnagar in the jeep car. He had profusely bled and was treated as an indoor patient. He was removed to the Civil Hospital at Ahmedabad. He has produced Certificates, Exhs. 67 to 69 from the Civil Hospital, Ahmedabad, where he was kept for about 10 to 12 days. The injury by the bullet, according to him, was a serious one and was not healing and he had ultimately to get his right leg amputated below the knee-cap on the advice of the Surgeon, Dr.M.T.Mehta. According to him, he suffered unbearable pain and was not able to walk. He was advised to go to Military Hospital, Poona for further treatment.

He has stated that he could not attend to work for nearly three months and that he was finding it difficult to walk even with crutches. Then he has spoken about the financial loss and expenses that he had to incur. He has denied the suggestion that the injury had occurred on account of his fault. There was no suggestion put in the cross-examination to him that he had tried to snatch the rifle from the Constable and that he came to be injured in that process, a story which has been put forth by the respondent No.2-Constable in his deposition.

8.2 It appears from the Certificate issued by the Medical Officer, Civil Hospital, Himatnagar, on 30.4.1976, which is at Exh.66, that the respondent No.1 Govindbhai was brought to the hospital with a Yadi from the P.S.I. on 22.4.1976 at 8.30 p.m. and on examination, the following injuries were found on his person:-

- "1. An oval punctured wound on the inner side of interior surface of right thigh, placed 2" above the right knee, size being 1 cm. x 2 cm. diameter. The edges of the wound were seen inverted.
2. A rounded, lacerated wound placed anteriorly and medially and just above of the wound No.1 size being of 2 cm. diameter approximately.
3. An abrasion on right thigh placed anteriorly and above of the wound No.1, size being 2 cm. x 1-1/2 cm.
4. A punctured wound placed posteriorly and laterally in right 'popliteal fossa' size 2 cm. diameter approximately.
5. Fracture of the lower half femur into multiple irregular pieces shown in X-ray No.267 dated 22.4.1976 of the said person of right thigh (A.P. view) and knee.

8.3 It was also recorded in the Certificate that the patient was profusely bleeding from the wounds. The Medical Officer opined that the injuries Nos.1,2,4 and 5 may have been caused by any forceful projectile, bullet like object and injury No.3 by any forceful contact with rough surface. These injuries are borne out even from the certificates issued from the Civil Hospital, Ahmedabad, Exhs. 66,67, 68 and other medical papers which are proved. There is no dispute before us that the



respondent No.1 did suffer the bullet injury and had undergone the medical treatment and that his right leg had to be amputated, since the bullet-injury did not heal and complications developed. Dr. M.T. Mehta's certificate dated 21.7.1976 at Exh.77 shows that the permanent disability of the respondent No.1 due to amputation of his leg was 60 per cent. All these injuries have been narrated also by the Medical Officer Dr. Jayant Gokhale, who had deposed in the Sessions Case and his deposition has come on record at Exh.80. Dr.M.T. Mehta in his deposition at Exh.86 has also referred to the bullet-injury caused to the respondent No.1 and to the fact that he had operated the patient for amputating his leg. He had also referred to the expenses which the respondent No.1 incurred and would have to incur. The evidence of the respondent No.1 is clearly supported by the medical evidence and we are satisfied, on the basis of the material on record, that the bullet-injury caused to the respondent No.1 by the respondent No.2-Constable on 22.4.1976 resulted in the loss of limb of the respondent No.1.

8.4 The witness K.M. Patel in his deposition at Exh.88 has stated that the firm in which the respondent No.1 was a partner was given the work of construction of the dam in 1976 and the work was to be completed before 30.5.1976. This witness, who is a Deputy Engineer in the Irrigation Department, has deposed that penalty of Rs.1,000/- was recovered for the late completion of the work. The son of the respondent No.1 Hirjibhai, in his deposition, Exh.92, has narrated the incident of 22.4.1976 and has stated that his father had received injuries on account of the wrongful act of the respondent No.2. He has spoken as to the expenses which were required to be incurred and the loss of income to his father. Witness Ahmed Hukka in his deposition at Exh.130 has stated that he was employed because the leg of the respondent No.2 had to be amputated and there was no one else to work for the firm. He has also stated that along with him another person Kanjibhai was also employed and that they were employed initially at the monthly salary of Rs.750/-, which was later raised to Rs.850/-.

9.1 Police Inspector N.M. Devda was examined for the original defendants and has deposed at Exh.133 that on 22.4.1976 the respondent No.2 Constable Keshabhai was on duty at Raigadh Out Post and on that day he was not given any order to open fire. In his cross-examination he has admitted that during investigation he found that the respondent No.2 had illegally opened fire and therefore he had issued a charge-sheet against him under Section

307 of the Indian Penal Code. He has stated that the gun was supplied to the respondent No.2 by the Government. He has admitted that when the respondent No.2 fired the rifle at Govindbhai, he was on duty. He has also admitted that the respondent No.2 was convicted by the High Court.

9.2 The respondent No.2 Keshabhai, in his deposition at Exh.134, has deposed that on 22.4.1976 he was on duty as a Police Constable at Raigadh Outpost. While he and Police Constable Motisinh were on the road, they saw truck No.4276 carrying 125 labourers. He stopped the truck and wrote down the name of the driver, who demanded a copy of the complaint. He, therefore, took the driver of the truck to the Outpost, prepared the complaint and gave a copy thereof to him. The driver then went away around 4.30 p.m. Thereafter at about 7.30 p.m., 17 persons came in a jeep-car and gave kicks to Head Constable Nanjibhai. The driver of the truck, who had also come, told the plaintiff that it was this witness who had lodged a complaint against him, and thereafter those 17 persons caused hurt to this witness by giving him fist and kick blows. He was then dragged to the jeep-car, but since two residents of Raigadh intervened, he jumped out of it and rushed to the Outpost with the group of 17 persons following him. He has then stated: "I came out with a loaded gun and told them to go away. Plaintiff of this suit started pulling the gun from my hand and I started pulling it towards my side and with the result there was gun (sic) fired. Plaintiff received injuries on his right leg and crowd ran away." He has admitted that the plaintiff was removed in a jeep-car to the Civil Hospital by his son Hirjibhai. He has also admitted that he was convicted by the High Court and sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.500/-. He has stated that he has undergone that sentence and paid up the fine. He has then stated that it was by way of private defence that he had opened fire and that he is not liable to pay any compensation. It may thus be seen that in his examination-in-chief itself, he has said that the shot was fired as a result of the plaintiff trying to pull the gun from his hand, and, in the same breath, he has said that it was by way of private defence that he had opened fire. In his cross-examination, he has admitted that he was on duty on 22.4.1976, when the incident took place. He has admitted that the High Court did not accept his defence. He has also admitted that the gun belonging to the State of Gujarat was in his custody. It is clear from his deposition that he was on duty at the relevant time and therefore the injury was caused to the plaintiff

by him during the course of his employment with the State of Gujarat.

10. From the oral and documentary evidence on record, which we have referred to, we are satisfied that the trial Court was right in coming to the conclusion that the respondent No.2 had illegally, wrongfully and unauthorisedly injured the respondent No.1-original plaintiff during the course of his employment with the State of Gujarat.

11.1 The security of man's person is the most elementary of civil rights. Even a Constable would be liable in tort like any other citizen for any unlawful interference with the person or liberty of another in the same manner as a private citizen would be. Actual violence inflicted on a person results in deprivation of the basic right of life which is guaranteed as a fundamental right under Art.21 of the Constitution. A direct application of physical force to a person of another, whether inflicted with any weapon or missile is battery, when it be done either intentionally or negligently. Battery falls in the category of tort known as trespass to the person; the other two in that category being assault and false imprisonment. In an action of trespass to the person, once the trespass is admitted or proved, it would be for the defendant to justify the trespass, if he can, on the defences available to him under the law, such as, that the defendant was acting in defence of his person or property or using reasonable force in the prevention of crime or stopping a breach of peace or in effecting lawful arrest or using permissible force under the law.

11.2 The question that arises before us is when a person is deprived of his fundamental right to life or personal liberty, except according to the procedure established by law, by police and the wrong done is actionable, is the State responsible for such deprivation caused by a wrongful act committed by a member of the police force.

11.3 It is a rule of law that an employer, though guilty of no fault himself, is liable for the damage done by the fault or negligence of his servant acting in the course of his employment (Per Lord Reid in *Staveley Iron & Chemical Co. V. Jones*, (1956) AC 627 at 643). On the other hand, if it is established that master himself owed a duty to the plaintiff and that duty has been broken by the act of the servant, the master will be liable for his primary liability and not vicarious liability. In

England, Crown immunity in tort was brought to an end by the Crown Proceedings Act 1947, which by Section 2 subjected Crown to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject; in respect of torts committed by its servants or agents; in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property. Thus, the Crown is made vicariously liable to third parties for torts committed by its servants in the course of their employment, if committed in circumstances which would render a private employer liable. It was also provided that the Crown was not to be liable, unless the act or omission in question would, apart from the Act, have given rise to a cause of action in tort against the servant or agent. This preserves such defences as acts of state and the exercise of statutory or prerogative powers but it does not protect the Crown from liability for the tortious act of its servant which is ultra vires the statute creating the powers under which the act is purported to be done, nor does it protect the Crown from the negligent exercise by its servant of such powers. (See CLERK & LINDSELL on TORTS, Fourteenth Edition, Paragraph 153 at page 87).

11.4 In England by Section 48 of the Police Act, 1944 the Chief Officer of the Police for any police area is made liable in respect of torts committed by constables in the like manner as a master is liable in respect of torts committed by his servants in the course of their employment.

12. Any police atrocity, be it custodial or otherwise, which results in death or injury to a person is per se a violation of fundamental right guaranteed by Article 21 of the Constitution. The defence of sovereign immunity would in such cases be alien to the concept of guarantee of the fundamental right to life and personal liberty. Assault or battery, when committed by the State-agency would be a violation of the fundamental right to life guaranteed by Article 21. The doctrine of sovereign immunity of the State would be subject to the constitutional mandate enjoining a duty on the State not to deprive any person of his life or personal liberty without following the procedure established by law. Causing injury or death by police excesses would be a clear violation of such right and such wrongful acts even if referable to the sovereign

functions of the State of maintenance of law and order will not immune the State from its strict liability which arises due to the violation of the fundamental right to life and personal liberty. The State must in such cases adequately compensate for the wrong done irrespective of the fact that it was done by the employee during the course of employment, which is relatable to the sovereign functions of the State, such as maintenance of law and order.

13. Tort committed by a State employee resulting in violation of fundamental right would be an actionable wrong for which a remedy lies in Civil Court for damages to compensate the victim. The fact that a public law remedy lies under Articles 32 and 226 of the Constitution before the Superior Courts in respect of torts committed by police for which State is liable on the principle of strict liability when there is violation of the fundamental right to life under Article 21, would not take away the power of civil Court to grant relief of damages for violation of fundamental rights by the State agency by committing such tort. The ordinary civil Courts have jurisdiction in all matters of civil nature. As provided by Section 9 of the Code of Civil Procedure, the Courts shall, subject to the provisions contained in the Code, have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Violation of fundamental right to life by committing a tort would therefore constitute a valid cause of action to seek redressal in a civil court. Such violation by tortious act of the police being an actionable wrong can be tried in a civil Court and a large portion of the population of the rural area of this vast country would find it more convenient to approach the civil Courts in their local area rather than to rush to the High Court or the Supreme Court for invoking their extra-ordinary writ powers. Suits for compensation against the State Government are not excluded from the jurisdiction of the civil Courts. Therefore, in a suit for damages for a tort committed by an employee of the State, where the liability of the State arises, the civil Court has jurisdiction to pass a decree for damages against the State. In case of an established breach of fundamental rights, the liability of the State is a strict liability and no question of pleading a defence of sovereign functions can now arise in face of the Constitutional protection of the fundamental rights which enjoins a duty on the State not to violate them. Therefore, when the said defence is not available in context of the established breach of fundamental rights, the civil Court can award damages for

such violation against the State for the tort committed by the police during the course of employment, even though the maintenance of law and order may be in the nature of sovereign functions of the State.

13.2 The Civil Court obviously has to determine whether the tort in question committed by the State employee violates the fundamental right of the person. When the plaintiff establishes that the police man has, during the course of his employment, caused physical harm such as battery, that by itself is sufficient proof of violation of fundamental right to life even if the expression 'fundamental right' is not used in respect of such harm. The fundamental rights are all-pervasive and do not depend on whether they are so described. When physical harm is wrongfully caused by the State agency, it amounts to violation of the right to life and it does not require a label to become such violation. Therefore, mere non-mention of Article 21 in the pleadings will not defeat a claim where the facts proved clearly establish that the fundamental right to life is in fact violated. In other words, when a person pleads and proves that he was tortured, maimed or assaulted by the police wrongfully, that established fact itself means that the fundamental right of that person to life is violated and even if he had not added the surplussage to the effect: "therefore my fundanental right under Article 21 is violated", it nonetheless remains a violation of his fundamental right under Article 21 and he cannot be non-suited on the ground that there is no pleading or issue to that effect.

14. We gain support for our above conclusions from the decision of the Hon'ble Supreme Court in D.K. BASU versus STATE OF W.B., reported in (1997) 1 SCC, 416 in which the Supreme Court held that custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. The protection of an individual from torture and abuse by the police and other law-enforcing officers is a matter of deep concern in a free society, observed the Supreme Court. The question before the Supreme Court was whether monetary compensation should be awarded for established infringement of the fundamental rights guaranteed under Articles 21 and 22 of the Constitution of India. It was observed: "Whether it is physical assault or rape in

police custody, the extent of trauma a person experiences is beyond the purview of law." "Custodial torture" is held to be a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It was held that the expression "life or personal liberty" in Article 21 includes the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. The precious right guaranteed by Article 21 cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. It was observed that it cannot be said that a citizen 'sheds off' his fundamental right to life the moment a policeman arrests him. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21, whether it occurs during investigation, interrogation or otherwise. It was further observed that the interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. Referring to Kasturi Lal's case (supra), the Supreme Court reiterated what it had said in Nilabati Behera vs. State of Orissa, reported in (1993) 2 SCC 746, reproducing the following observations which appeared at page 761 of the reports:

"In this context, it is sufficient to say that the decision of this Court in Kasturilal upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this Court in Rudul Sah and others in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy under Articles 32 and 226 of the Constitution. On the other hand, Kasturilal related to the value of goods seized and not returned to the

owner due to the fault of government servants, the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. Kasturilal is, therefore, inapplicable in this context and distinguishable."

The Supreme Court then held that the claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortious acts of the public servants. It was held:

"Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved."

It was further observed:

"The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much, as the protector and custodian of the indefeasible rights of the citizens."

The Court reiterated what was stated in Nilabati Behera's case that it was not always enough to relegate the heirs of victim of custodial death to the ordinary remedy of a civil suit to claim damages, as that remedy in private law indeed is available to the aggrieved party. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy, as held by the Supreme Court in Nilabati Behera's case (supra). We then would reproduce hereunder paragraph 54 of the judgment which in our view clearly lays down that the State is vicariously liable for the acts of its public servants which amount to an established infringement of the fundamental right to life and that the claim of the citizen is based on the principle of strict liability to



which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State and such award of compensation in public law jurisdiction is without prejudice to any other action, like civil suit for damages, which is lawfully available to the victim or the heirs of the deceased-victim with respect to the same matter.

"54. Thus, to sum up, it is now a well-accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit." (emphasis supplied)

15. It is significant to note that the Supreme Court, in terms, held that the amount of compensation as awarded by the Court in its public law jurisdiction and paid by the State to redress the wrong may in a given case be adjusted against any amount which may be awarded to the claimant by way of damages in civil suit. From the aforesaid holding of the Supreme Court in D.K. Basu's case (supra), we gain strength in stating that an action in respect of a tort committed by a public servant, which violates fundamental right to life, would lie in the civil Court and when the infringement of fundamental right to life is established, it will not be open for the State to claim sovereign immunity as a defence and the State would be vicariously liable for the tortious act committed by its functionaries which has resulted in such violation of fundamental right to life. The nature of liability that arises because of the violation of fundamental rights would, in our opinion, remain the same, irrespective of the forum from which the remedy is sought by the victim or the heirs of the deceased-victim. It cannot be said that though for violation of the fundamental right to life by tortious acts of a State employee the superior court may in its extra-ordinary powers award compensation, notwithstanding the availability of the alternative forum, that liability changes its colour when the remedy is sought in the civil Court. The remedy of compensation under Articles 32 and 226 of the Constitution is evolved as an additional and speedy remedy and would be over and above the remedy available, to claim damages for tortious act of a State servant violating fundamental right to life in a court of ordinary civil jurisdiction. The strict liability of the State for such violation can be enforced even in a civil Court when there is violation of fundamental right to life. Albeit when the victim approaches the civil Court, he will have to go through the rigmarole of the procedural laws and establish his case as regards the breach of fundamental right to life by leading appropriate evidence and will also have to establish his case as regards his claim for compensation for the wrong done. These detailed fetters do not operate, when the Supreme Court or the High Court exercises its extra-ordinary powers. But, nonetheless, as observed by the Supreme Court, there has to be an established breach of fundamental right to life by a wrongful act of the public servant to create a strict liability on the part of the State.

16. We must here refer to a decision of the Andhra Pradesh High Court in Challa Ramkonda Reddy and others v. State of A.P. by District Collector, Kurnool, reported

in AIR 1989 Andhra Pradesh 235 in which it was held that the theory of sovereign function does not clothe the State with the right to violate the fundamental right to life and liberty guaranteed by Art.21 and no such exception can be read into it by reference to Art.300(1). It was held that where a citizen was deprived of his life or liberty, otherwise than in accordance with the procedure prescribed by law, it is no answer to say that the said deprivation was brought about while the officials of the State were acting in discharge of the sovereign functions of the State and suit for compensation against the State was, therefore, maintainable in such cases. It was observed that this was the only mode in which the right to life guaranteed by Art.21 could be enforced. We respectfully agree with the ratio of that decision.

17. The facts which are established in the case clearly show that the respondent No.2, during the course of his employment as a Constable, had on 22.4.1976, when the respondent No.1 had come to the Police Outpost, wrongfully and without any justification whatsoever, wounded him by a gun-shot which resulted in amputation of his right leg. This tort, since it was committed by the State servant, amounted to violation of the fundamental right to life of the respondent No.1 guaranteed by Art.21, raising a strict liability on the part of the State which could be remedied by giving compensation in a civil Court, on the basis that the State is vicariously liable for such an act.

18. There is no challenge against the quantum of compensation, which has been awarded and on seeing through the record, we find that the quantum awarded is in no way excessive, and is just and proper.

19. We therefore hold, for the reasons that we have indicated hereinabove, that, the trial Court was right in holding that the State of Gujarat was vicariously liable for the tort committed by the respondent No.2-Police Constable, and in awarding damages to the respondent No.1.

In view of what we have said above, there is no substance in this appeal, and the appeal is dismissed with costs.

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